No. 802

MAR 27 1956

HAROLD B. WILLEY, Cl

IN THE

Supreme Court of the United States

October Term, 1955

UNION OIL COMPANY OF CALIFORNIA, a corporation,
Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal From the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

JURISDICTIONAL STATEMENT.

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IN THE

Supreme Court of the United States

October Term, 1955

No. .....

UNION OIL COMPANY OF CALIFORNIA, a corporation,
Appellant,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Appellee.

(Four cases consolidated)[1]

On Appeal From the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

JURISDICTIONAL STATEMENT.

Appellant appeals from the judgments of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, rendered and entered on November 21, 1955, affirming the judgments of the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, convicting appellant of eight separate violations of subdivision (b) of Section 24242 of the Health and Safety Code of

[1]The four cases (Municipal Court Nos. 32307, 33168, 31978 and 34226) were consolidated for trial in the trial court, and were consolidated in the court below (Superior Court Nos. Cr. A. 3303, Cr. A. 3304, Cr. A. 3305 and Cr. A. 3306) for all purposes of appeal from the judgments of the Municipal Court. See record p. 87.

the State of California,[2] and submits this statement to show that the Supreme Court of the United States has jurisdiction of these appeals and that a substantial question is presented.

Opinion Below.

The opinion of the court below is reported in 137 A. C. A. 904, also in 291 P. 2d 587. A copy of this opinion is attached hereto as Appendix A.

Jurisdiction.

Prosecutions in these cases were brought and convictions obtained in the Municipal Court under Section 24242. The judgments of the Appellate Department affirming the judgments of the Municipal Court were rendered and entered on November 21, 1955, and no rehearing was had. Copies of the judgments of the Appellate Department are attached hereto as Appendix B. The notice of appeal was filed in the Appellate Department on January 30, 1956. The jurisdiction of the Supreme Court to review these decisions by direct appeal is conferred by 62 Stat. 929, 28 U. S. C. §1257(2), for the reason that the validity of Section 24242 has been drawn in question in these cases on the ground of its being repugnant to the Constitution of the United States, and the decision of the court below is in favor of its validity.

The Appellate Department of the Superior Court is the highest court of the state in which a decision could be

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[2]Two counts in Case No. Cr. A. 3303; one count in Case No. Cr. A. 3304; two counts in Case No. Cr. A. 3306; and three counts in Case No. Cr. A. 3305. Although the complaints charge appellant with the violation of subdivision (a) as well as subdivision (b) of the statute, the proof was, by stipulation, limited to subdivision (b). See record p. 206, *et seq.*

had. California Constitution, Art. VI, Sections 1, 4, 4b, 5 and 11.[3]

The jurisdiction of this court to review the judgments on direct appeal is sustained by *Winters v. New York*, 333 U. S. 507, 509, 92 L. Ed. 840, 846; *Miller v. Schoene*, 276 U. S. 272, 277, 72 L. Ed. 568, 570; and *Atchison, Topeka & S. F. R. Co. v. Public Util. Com.*, 346 U. S. 346, 348, 98 L. Ed. 51, 58.

The Statute Involved.

Said Section 24242 provides, and at all times herein mentioned has provided, as follows:

> "§24242. *Discharge of air contaminants: Shade and opacity.* A person shall not discharge into the atmosphere from any single source of emission whatsoever any air contaminant for a period or periods aggregating more than three minutes in any one hour which is:
>
> (a) As dark or darker in shade as that designated as No. 2 on the Ringelmann Chart, as published by the United States Bureau of Mines, or
>
> (b) Of such opacity as to obscure an observer's view to a degree equal to or greater than does smoke described in subsection (a) of this section." Official edition citation: California Stats. 1947, Ch. 632, Sec. 1, p. 1644.[4]

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[3]The judgments are the final word of the final court in California. This has been recognized by this court on several occasions. (*Kim Young v. California*, 308 U. S. 147, 154, 84 L. Ed. 155, 161; *California v. Zook*, 336 U. S. 725, 728, 93 L. Ed. 1005, 1008.)

[4]Incidentally involved, but not attacked, are Section 24253 of said Health and Safety Code which provides that the violation of Section 24242 constitutes a misdemeanor, and Section 19 of the Penal Code of the State of California which prescribes the punishment for misdemeanors. These statutes are reproduced in Appendix C at p. 52.

Question Presented.

Appellant was convicted by a jury in the above mentioned Municipal Court of discharging into the atmosphere from its refinery at Wilmington, California, on eight separate occasions, an air contaminant of an opacity alleged to be forbidden by subdivision (b) of said Section 24242.

The question presented by these appeals is whether these convictions deprive appellant of its property without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States because, as appears in these cases, said Section 24242, and more particularly subdivision (b) thereof, is so vague, uncertain, indefinite and unintelligible that the same fails to prescribe an ascertainable standard of guilt.

Statement.

Subdivision (b) is unintelligible because it is impossible to measure the opacity of an emission in terms of its shade. It is well settled by this court that a statute which either forbids or requires the doing of an unintelligible act violates due process.

In *Connally v. General Construction Co.*, 269 U. S. 385, 391, 70 L. Ed. 322, 328, the court, in striking down a state statute for vagueness, said:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will

render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."[5]

We do not anticipate that opposing counsel will quarrel with this well entrenched doctrine. It is necessary to show, however, that it is applicable to subdivision (b) of the statute under the facts in these cases. This we propose to do.

How the Federal Question Is Presented.

Appellant raised the federal question here involved in each of the cases at the beginning of this litigation and consistently at all appropriate times thereafter, as follows: initially in the trial court by demurrers to the complaints, which demurrers were overruled; at the conclusion of the evidence and before the case was submitted to the jury, by motions for an advised verdict, which motions were denied; by motions in arrest of judgment made after the rendition of the verdicts, which motions were denied;

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[5]See also *Lanzetta v. New Jersey*, 306 U. S. 451, 453, 83 L. Ed. 888, 890; and *Winters v. New York*, 333 U. S. 507, 515, 92 L. Ed. 840, 849.

and finally in the court below, on appeal from the judgments of the trial court.[6]

We expressly call attention to these several occasions upon which appellant raised the federal question in order to show that the question was seasonably raised and that the court below necessarily passed on it.[7]

Explanation of Ringelmann Chart and Its Use.

A full understanding of the Ringelmann Chart mentioned in the statute is essential in order to comprehend what is to follow.

As appears from United States Bureau of Mines Circular 6888, People's Exhibit 4, the Ringelmann system is a scheme whereby graduated shades of gray, varying by five equal steps between white and black, may be reproduced by means of a rectangular grill of black lines of definite width and spacing on a white background. At a distance, by optical illusion, these black lines merge with the white backgrounds and appear to the observer as solid shades of gray.

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[6]References to the record and pertinent quotations therefrom in support of this assertion are somewhat voluminous and, since their only purpose is to substantiate our statement that the federal question was seasonably raised in the courts below, they are set forth in Appendix D at p. 53, *et seq.*

[7]The portion of the lower court's opinion dealing with the appeals of this appellant states our contention as being merely that "section 24242 violates the due process provision of *our* constitution" (italics ours). However, the due process clause of the California Constitution as well as that of the United States Constitution were drawn into question, and no doubt the court meant both.

Although subdivision (a) of the statute is not directly involved here, it is necessary to understand what this subdivision prescribes, for it is a vital preliminary step in the operation of subdivision (b). Subdivision (a) requires that the observer compare the shade of gray of Ringelmann No. 2 with the actual emission or plume observed, and, if the latter appears darker than the former, the emission is a violation of the statute. When the inspectors[8] finish their training course they dispense with the actual use of the chart and rely upon memory alone.

But, as pointed out by the court below, "(s)ubdivision (a) only begins to solve the problem," for it does not deal with light-colored emissions, such as the ones in the cases at bar. Subdivision (b) is designed to regulate light-colored emissions.

We have contended at all times that subdivision (b) requires the observer: (1) to compare the emission he is observing with an imaginary plume of smoke of the shade of Ringelmann No. 2 (to be conjured up by the observer!); (2) to estimate the degree of opacity of this imaginary plume; and (3) from such comparison to determine whether the actual plume is of such opacity as

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[8]Reference is to the inspectors employed by the Air Pollution Control District, the administrative body set up pursuant to Section 24198, *et seq.*, of said Health and Safety Code, California Stats. 1947, Ch. 632, Sec. 1, p. 1640, with the duty and authority of regulating and controlling air pollution within the county, and hereinafter referred to as the District.

to obscure his view to a degree equal to or greater than the imaginary plume does.

The prosecution construed the statute differently. Their contention was that plumes of the shades of Ringelmann Nos. 1, 2, 3 and 4 were assumed to have fixed opacities of 20%, 40%, 60% and 80%, respectively, and the trial court agreed with this construction.[9]

On appeal, the court below properly rejected this interpretation of subdivision (b). That court construes the statute as we do, but then it apparently—and, we submit illogically—takes the position that opacity can be measured in terms of shade; and this, we expect to show, is scientifically impossible and contrary to the uncontradicted evidence.

The Federal Question Is Substantial.

Before proceeding further, we respectfully insist that the convictions in these cases can not be regarded as trivial police court punishment; nor should it be implied that the use of the Ringelmann Chart as a tool of air pollution control is not fraught with serious consequences to those regulated. A person affected by subdivision (b) is placed in an intolerable position because he can be convicted of daily violations,[10] and, as we shall show, he has no means of knowing, short of suspending operations, how he can comply with the law.

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[9]See record pp. 343-348.

[10]Each emission constitutes a separate offense. See Health and Safety Code, Section 24253.

Reason Why Subdivision (b) of Section 24242 Is Meaningless.

It is just as impossible to measure opacity in terms of shade as it is—to select a comparison at random—to measure weight in terms of volume. This is borne out by the uncontradicted testimony in these cases[11] and by certain scientific principles of which the court can take judicial notice.[12] Without a full comprehension of these truths, it is impossible to have a proper understanding of the issue in these cases.

We shall first call the court's attention to two phenomena which demonstrate these facts because they will probably drive our point home with more force than any amount of discussion could. It is easy for the members of the court to take judicial notice of these phenomena, since all that is required is that they accept the evidence of their senses. The first is Hering's Grey Series.

Hering's Grey Series.

Dr. James P. C. Southall, Professor of Physics at Columbia University, points out the deceptive effect upon the human eye[13] of two different lights, closely contiguous to each other, and calls attention to a simple experiment by Hering which proves his point. By placing the same

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[11]See footnotes 19 and 20, *infra.*

[12]"Invalidity may be shown by things which will be judicially noticed * * * or by facts established by evidence." (*Weaver v. Palmer Bros. Co.*, 270 U. S. 402, 410, 70 L. Ed. 654, 656.

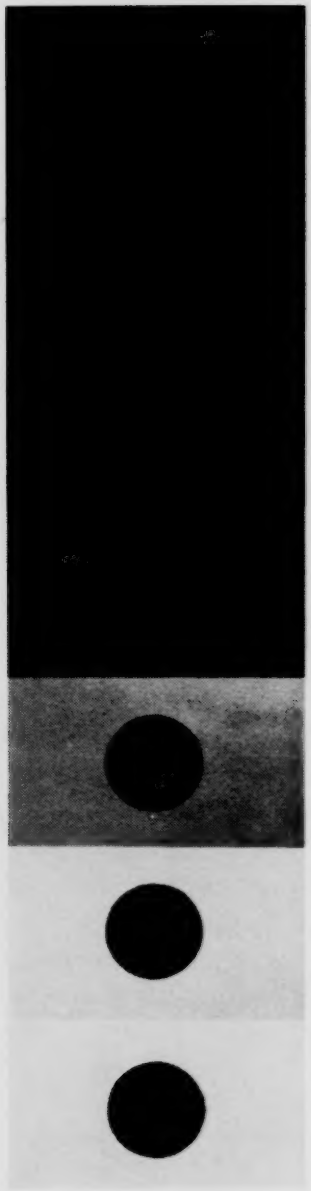
[13]Introduction to Physiological Optics (Oxford University Press, 1937) p. 394, *et seq.*

medium gray wafer on cards in regular gradations from pure white to deep black, Hering showed that a wafer was made to look almost black at the first extreme and almost white at the other. Hering's Grey Series is reproduced on the opposite page. It speaks for itself.

The same principle is obviously applicable to plumes such as the ones here involved. How, then, may we ask, is either the inspector or the defendant to determine whether a given plume matches Ringelmann No. 2 in shade?

Let us now consider the implications of Hering's experiment upon the extent to which a plume may obscure the "observer's view." We see at once that this statutory phrase "of such opacity as to obscure an observer's view" provides no ascertainable standard, because the amount of obscuration depends in each case upon the amount of contrast between the shade of the object and that of the plume through which it is observed. If the plume is light, a dark object will be more visible through it than a light one, and vice versa. If the plume and the object have the same shade, the latter merges in the former and is virtually invisible.

Finally, to compound the confusion, how much is the observer's view obscured when two or more objects of different shades are observed through the same plume, *i.e.*, when the degree of obscuration of each of such objects is different?



Hering's Grey Series

The Plate Glass Window: Transparent or Opaque?

This is the second phenomenon Dr. Southall mentions. He says:

> "To a person sitting in a room at some little distance from a window the twilight sky still looks bright, but as soon as a lamp is lighted inside, night seems suddenly to have descended outdoors."[14]

Thus, in bright sunshine the glass in the window is transparent; it does not obscure our view at all. Yet after dark, if there is light on our side of the window, the glass obscures our vision completely: we cannot see through it. All we see is the reflection of our own image and the objects near us. Yet the composition of the window remains unchanged!

Everything that has been said regarding the glass window is obviously pertinent to transparent or translucent substances—including the emissions here in question. The evidence shows that the contents of these emissions were approximately the same at all times—morning, noon and night.[15] As is true of the glass window, the amount that these emissions obscure the observer's view varies greatly, depending upon the light contrasts under which the observations are made. Objects may be clearly seen through these plumes at certain times and yet be completely obscured at others. How is appellant, or any person similarly situated, to determine whether he is violating the law?

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[14]Introduction to Physiological Optics (Oxford University Press, 1937) p. 394.

[15]See record, p. 740 *et seq.* Also pp. 288-292.

The Evidence Shows That It Is Impossible to Measure Opacity in Terms of Shade.

The evidence, which we shall briefly summarize, is without conflict and leads to the unescapable conclusion that it is impossible to measure opacity in terms of shade.

None of the inspectors who testified as to the opacity of the emissions from appellant's refinery attempted to compare them, as required by statute, with an imaginary plume of the same shade as that of Ringelmann No. 2. All assumed, contrary to the wording of the statute, that all that was required to convict was to establish that the percentage of opacity of the emission equalled or exceeded 40 per cent.[16]

While all testified that they could "read opacity" within ten per cent of accuracy[17] (in contradiction of the testimony of Dr. Jeffreys, the scientist produced by appellant, who stated that no one could read opacity with any degree of accuracy[18]), all corroborated Dr. Jeffreys to the extent of admitting that the shade of any given plume had no relation to its opacity.[19]

Dr. Jeffreys testified that to the human eye the appearance of any plume, whatever may be its true degree of opacity, varies greatly depending upon a number of factors,

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[16]For example, see testimony of Inspector MacDonald, record pp. 471, 472.

[17]See record p. 373. If required, we would be prepared to show that such testimony was contrary to the laws of optics and is therefore to be disregarded; but it is unnecessary, for the only point that need concern us here is whether it is possible to measure opacity in terms of shade.

[18]See record p. 1133 *et seq.*

[19]Record references to the various inspectors' testimony are as follows: Mestad p. 271, Andranigian p. 362, Rennie pp. 386, 387, MacDonald pp. 485, 490, 491.

viz., the contrast with the background upon which it is seen, the position of the sun, the thickness of the plume, the position from which it is viewed and others which could be mentioned; and that the variance is even greater in the case of light plumes especially if they contain liquid droplets (like those emitted from appellant's refinery) which have a great scattering power for light.[20] It is neither necessary nor desirable to refer to all of the testimony affecting these plumes. If opposing counsel claim there is any evidence that contradicts this testimony, they are at liberty, of course, to call such evidence to the court's attention. In any event it would have to be disregarded as contrary to scientific fact.[21]

Meaning of Opacity as Used in Statute.

Some confusion has arisen over the meaning of the term "opacity" as used in the statute. We content ourselves with a brief word.

We agree with the interpretation of the court below that the statute condemns smoke that is "at least as hard to see through (a paraphrase of the statutory language, 'to obscure an observer's view') as is smoke which is as dark or darker than Ringelmann No. 2."

What the court apparently failed to recognize is that the scientific measurement of the degree to which light fails to penetrate a plume is something quite different from a determination of the extent to which the plume

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[20]See record p. 1117 *et seq.*

[21]*Jacobson v. Mass.*, 197 U. S. 11, 23, 49 L. Ed. 643, 648; *Neilson v. Houle*, 200 Cal. 726, 727, 254 Pac. 891; *Austin v. Newton*, 46 Cal. App. 493, 497, 189 Pac. 471, 472; *Coughlin v. Great Western Power Co.*, 183 Cal. 548, 551, 191 Pac. 920, 922; and *Roy v. Smith*, 131 Cal. App. 148, 151, 21 P. 2d 151, 153.

obscures the observer's view. Under the principles of physiological optics above referred to and the truths established by the phenomena above described, it is apparent that such scientific measurement can only be accomplished by means of a lamp opposite a photo-electric cell (commonly referred to as an "electric eye"),[22] within the stack from which the effluent issues where no reflected light is present.

The District also fell into this error, for in training its inspectors it used an electric eye to measure the opacity (?) of the emissions that the inspectors "read."[23]

This, plus the presence of condensed water vapor in the atmosphere, accounts for the astonishing circumstance that a similar electric eye, installed by appellant, and admittedly operating accurately,[24] in the stack emitting the plumes which are the subject of the three counts in case No. Cr. A. 3305, registered opacities (with an exception not pertinent to the present discussion) of 3%, 5% and 4% respectively,[25] against opacity readings of the District's inspectors of 100%.[26]

Opinion of Court Below.

Implicit in the decision of the court below is a holding that there *is* a relationship between shade and opacity, yet the opinion makes no pretense of indicating what that relationship is. The opinion is confusing on this

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[22]See record pp. 242, 249.

[23]See record pp. 398, 399.

[24]See record pp. 949, 1102, *et seq.*, 1107 *et seq.*

[25]See record pp. 981, 983, 984.

[26]See record pp. 435, 455, 456, 499.

vital point. Thus, at one place the lower court says unequivocally that:

> "Section 24242 does not describe the contaminant it prohibits in subdivision (b) as a 40 per cent or a 60 per cent opacity, nor in any manner that justifies a reference to the 'equivalents.' That which is prohibited is the discharge of a contaminant that has an opacity as great or greater than that possessed by smoke which is as dark or darker in shade than Ringelmann No. 2. '40 per cent black' is nowhere declared to mean 40 per cent opaque."[27]

Yet at another, it apparently finds (contrary to the evidence and scientific truth as well) that a plume of the shade of Ringelmann No. 2 has a fixed opacity of 40 per cent because it says:

> "They (the inspectors) * * * could testify: * * * 'The opacity of smoke that matches Ringelmann No. 2 is 40%; that which was belching from the stack in question had a greater opacity.' "[28]

The court also says:

> "They (the witnesses) are agreed on but a few of the scientific problems presented by 'smog.' The question whether smoke as dark or darker than Ringelmann No. 2 has an opacity that may be used as a standard of comparison is not one of those on which there appears to be an agreement."[29]

The reference to the disagreement of the witnesses on the scientific problems presented by "smog" apparently

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[27]See Appendix A, p. 25.

[28]*Ibid.* at p. 27.

[29]*Ibid.* at p. 29.

applies to one of the other cases dealt with in the opinion. It is not pertinent here, because there was only one scientific problem discussed in the cases at bar: the one designated by the court below as "the most difficult question before (it)," namely, whether "smoke that was as dark or darker than Ringelmann No. 2 (obstructs) the view to an identifiable degree." We respectfully assert that the lower court's statement to the effect that the witnesses were not in agreement on this question is not supported by the record.

Finally, it should be noted that the entire structure of the lower court's reasoning is based upon the assumption that the schooling given the inspectors by the District qualified them to "read" opacity. Calling the inspectors experts does not make them such. Expert testimony, where there is a sound basis for it, is well established in our jurisprudence, but it is not entitled to any weight in a field which scientifically does not exist.

A Decision on the Merits by This Court Is Important to the Public and to Air Pollution Control Authorities Everywhere.

The first paragraph of the lower court's opinion indicates that other prosecutions similar to the cases at bar are anticipated. According to published statistics of the District, 2974 criminal cases were filed during the year 1955, against 395 in 1954. Our best information is that most of these were based upon the statute here in question. If the use of the Ringelmann Chart as a measurement of opacity is a valid method of regulating air pollution, it is not unreasonable to suppose that it will spread to other communities. It is therefore important that this court determine whether this statute is valid.

Conclusion.

The lower court's ruling that the statute satisfies due process implies that it is intelligible; yet we look in vain in the opinion for any suggestion as to how one may determine whether a given emission violates the statute. The public and control officials alike are left to guess at its meaning. Any person accused of violating subdivision (b) is wholly at the mercy of the inspectors of the District; the opacity of any emission he is charged with is what they say it is. No matter how complete his technical advice and equipment may be, the accused has no way of refuting the inspectors' testimony. Certainly, modern science and engineering should be capable of devising a means of regulating the emission of air contaminants that is at once understandable and more effective than that prescribed by subdivision (b).

We respectfully urge that the question presented by these appeals is substantial and ask the court to note probable jurisdiction.

Respectfully submitted,

ALEXANDER MACDONALD,
L. A. GIBBONS,
DOUGLAS C. GREGG,
A. ANDREW HAUK,
Counsel for Appellant.

APPENDIX A.

In the Appellate Department of the Superior Court, County of Los Angeles, State of California.

Superior Court Nos. CR A 3284 and CR A 3285.

Trial Court Nos. C 13216 and C 13304.

People of the State of California, Plaintiff and Respondent, vs. Plywood Mfg's of California, etc., Defendant and Appellant.

Appeals by defendant from a judgment and an order in each case, of the Municipal Court of the Los Angeles Judicial District, Harry R. Simon, Judge. Affirmed. Appeals from orders dismissed.

For Appellant—Maurice J. Hindin, Esq.

For Respondent—S. Ernest Roll, District Attorney; Pere J. Sullivan and Lewis Watnick, Deputy District Attorneys.

Amicus Curiae—Attorney General of California.

Superior Court No. CR A 3286.

Trial Court No. M-22589.

People of the State of California, Plaintiff and Respondent, vs. Shell Oil Company, etc., Defendant and Appellant.

Appeals by defendant from a judgment and an order of the Municipal Court of Compton Judicial District, Donald E. Dunbar, Judge. Reversed.

For Appellant—McCutchen, Black, Harnagel & Greene.

For Respondent—S. Ernest Roll, District Attorney; Pere J. Sullivan, Robert Wheeler and Lewis Watnick, Deputy District Attorneys.

Amicus Curiae—Attorney General of California.

Superior Court Nos. CR A 3303, CR A 3304, CR A 3305, CR A 3306.

Trial Court Nos. 32307, 33168, 31978, 34226.

People of the State of California, Plaintiff and Respondent, vs. Union Oil Company of California, etc., Defendant and Appellant.

Appeals by defendant from judgments and orders of the Municipal Court of Los Angeles Judicial District. Mark Brandler, Judge. Affirmed.

For Appellant—L. A. Gibbons, Douglas Greeg, A. Andrew Hauk, MacDonald & Halstead, Esqs.

For Respondent—Roger Arnebergh, City Attorney; Donald M. Redwine, Assistant City Attorney; Philip E. Grey, Deputy City Attorney.

Amici Curiae—Attorney General and County Counsel.

Superior Court No. CR A 3327.

Trial Court No. M-8179.

People of the State of California, Plaintiff and Respondent, vs. Southern California Edison Company, etc., *et al.*, Defendants and Appellants.

Appeals by defendants from a judgment and an order of the Municipal Court of South Bay Judicial District. Otto B. Willett, Judge. Affirmed.

For Appellants—Bruce Renwick, C. Robert Simpson, Jr., and John M. Hall, Esqs.

For Respondent—S. Ernest Roll, District Attorney, Jere J. Sullivan, Fred N. Whichello and Lewis Watnick, Deputy District Attorneys.

Amicus Curiae—Attorney General.

OPINION.

Each of these cases involves one or more charges, and convictions, of "smog" violation. We have concluded, without any misgivings, that the legislation upon which the several complaints are based is, on its face, constitutional and enforceable. Because we anticipate that the one of the above cases which we find it necessary to reverse may be retried, and because further prosecutions of a like nature will doubtless be undertaken, we are deeming it advisable to express some of our conclusions more fully than we otherwise would do. Even so, we are not undertaking to comment on every contention made by each appellant. Our silence on a proposition is not a good basis for an inference that we have overlooked it.

As a part of the public campaign against "smog," the legislature added to the Health and Saftey Code sections 24198-24341, constituting Chapter 2 of the 20th division. Section 24208 declares: "As used in this chapter, 'air contaminant' includes smoke, charred paper, dust, soot, grime, carbon, noxious acids, fumes, gases, odors, or particulate matter, or any combination thereof." Section 24242 provides: "A person shall not discharge into the atmosphere from any single source of emission whatsoever any air contaminant for a period or periods aggregating more than three minutes in any one hour which is: (a) As dark or darker in shade as that designated as No. 2 on the Ringelmann Chart, as published by the United States Bureau of Mines, or (b) Of such opacity as to obscure an observer's view to a degree equal to or greater than does smoke described in subsection (a) of this section." For the purposes of contrast only, we note the provisions of section 24243: "A person shall

Superior Court Nos. CR A 3303, CR A 3304, CR A 3305, CR A 3306.

Trial Court Nos. 32307, 33168, 31978, 34226.

People of the State of California, Plaintiff and Respondent, vs. Union Oil Company of California, etc., Defendant and Appellant.

Appeals by defendant from judgments and orders of the Municipal Court of Los Angeles Judicial District. Mark Brandler, Judge. Affirmed.

For Appellant—L. A. Gibbons, Douglas Greeg, A. Andrew Hauk, MacDonald & Halstead, Esqs.

For Respondent—Roger Arnebergh, City Attorney; Donald M. Redwine, Assistant City Attorney; Philip E. Grey, Deputy City Attorney.

Amici Curiae—Attorney General and County Counsel.

Superior Court No. CR A 3327.

Trial Court No. M-8179.

People of the State of California, Plaintiff and Respondent, vs. Southern California Edison Company, etc., *et al.*, Defendants and Appellants.

Appeals by defendants from a judgment and an order of the Municipal Court of South Bay Judicial District. Otto B. Willett, Judge. Affirmed.

For Appellants—Bruce Renwick, C. Robert Simpson, Jr., and John M. Hall, Esqs.

For Respondent—S. Ernest Roll, District Attorney, Jere J. Sullivan, Fred N. Whichello and Lewis Watnick, Deputy District Attorneys.

Amicus Curiae—Attorney General.

OPINION.

Each of these cases involves one or more charges, and convictions, of "smog" violation. We have concluded, without any misgivings, that the legislation upon which the several complaints are based is, on its face, constitutional and enforceable. Because we anticipate that the one of the above cases which we find it necessary to reverse may be retried, and because further prosecutions of a like nature will doubtless be undertaken, we are deeming it advisable to express some of our conclusions more fully than we otherwise would do. Even so, we are not undertaking to comment on every contention made by each appellant. Our silence on a proposition is not a good basis for an inference that we have overlooked it.

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not discharge from any source whatsoever such quantities of air contaminants or other material which cause injury, detriment, nuisance or annoyance to any considerable number of persons or to the public or which endanger the comfort, repose, health or safety of any such persons or the public or which cause or have a natural tendency to cause injury or damage to business or property." Each charge found in the cases we are considering was based on section 24242, so that the meaning and constitutionality of section 24243 are not presently at issue. As no question has arisen about the requirements that the contaminant must come from one source of emission, and continue for three minutes in an hour, we shall, usually, treat them as implicit in any situation, without express reference to them.

The first question to engage our attention arises out of the contention that the terms employed in the provisions of section 24242 render the section unconstitutionally indefinite. We find this not to be so. A statute is to be interpreted, if it can be done without violence to its language, so as to avoid rendering it unconstitutional. (*Palermo v. Stockton Theaters, Inc.* (1948), 32 Cal. 2d 53, 60, 195 P. 2d 1, 5.) Another rule of construction is that a statute shall be read in the light of the problem that it was designed to solve. (*Wotton v. Bush* (1953), 41 Cal. 2d 460, 467, 261 P. 2d 256, 260.)

Without laboring the point, we have concluded that the adjective "noxious," as used in section 24208, must be understood as applying to fumes, gases and odors, as well as to "acids," the word that immediately follows it. It will be noted that "noxious" does not apply to "smoke" and other substances that appear in the section before it does.

It is not every contaminant that section 24242 prohibits. To run afoul of the statute the contaminant must have one or both of these characteristics: (a) it must be as dark or darker in shade than shade No. 2 on the Ringelmann Chart, or (b) it must have an opacity that obscures "an observer's view to a degree equal to or greater than does smoke described in subsection (a)." With respect to subdivision (a), we have heretofore held, in *People v. International Steel Corp.* (1951), 102 Cal. App. 2d (Supp.) 935, 226 P. 2d 587, respecting a charge of discharging smoke, that the standard made use of in subsection (a) is sufficiently definite to satisfy due process. We see no reason to depart from this conclusion. In proving a violation, a witness may testify although he did not have a Ringelmann Chart actually in the field with him at the time he made his observations. One does not have to have a color chart in his hands to recognize a red flower, a blue sky, or a black bird. The question is one of credibility, not competency. Nor do we see any difficulty arising from the fact that a plume of smoke, for example, may appear less dark than Ringelmann No. 2 from one position, but darker than Ringelmann No. 2 from another viewpoint. If the contaminant has the substance that, fairly viewed from any position, gives it a shade as dark or darker than Ringelmann No. 2, it is condemned, no matter how light in color it may look to someone situated at another vantage point.

Subdivision (a) only begins to solve the problem of the discharge of contaminants into the air; it does not touch smoke and other substances too light in shade to come up to Ringelmann No. 2. They may be so substantial in nature, however, that they make it impossible to see an object on the other side. We have all seen very white

smoke that shut out the view completely. Again, they may obscure the view to a lesser degree than totality. We interpret "opacity" as used in subdivision (b) as meaning "want of transparency." It is so defined in the Century Dictionary and in Webster's New International Dictionary 2d ed. A substance is transparent, on the other hand, if it has "the property of transmitting rays of light, so that bodies can be seen through—opposed to opaque," to again quote from Webster's. We may, therefore, express the test of subdivision (b) in simple terms; it condemns smoke or any other contaminant that is at least as hard to see through as is smoke which is as dark or darker than Ringelmann No. 2. There is nothing mystic or incomprehensible about such a statement.

There is no unconstitutional uncertainty introduced by the reference to the "observer." Subsection (a) makes no mention of an observer, but, we inquire, how is the comparison of any smoke with the Ringelmann Chart to be made? Obviously by a person who is looking at the chart, or has looked at it until he knows its gradations, and compares the shade of the smoke before him with that of the chart. The extent to which smoke or any other contaminant obscures the view, which is but another way of saying, the extent to which it is opaque, may be determined by observation. To have observation, you must have an observer. Surely one who is arguing that a statute should give the common man a standard by which he can judge whether he is violating the law, will not insist upon a test that only a scientist with expensive equipment can make.

The further contention is made that section 24242 is unconstitutional because the ordinary person, having no special training, will not be able to tell whether his smoke

is as dark as Ringelmann No. 2, or whether its opacity equals that of smoke that matches Ringelmann No. 2. A moment's reflection detects the flaws in such an argument. A statute is invalid if its terms leave that which it attempts to control shrouded in uncertainty, but a statute, which declares an act, identified with certainty, to be unlawful, is not rendered unconstitutional because the act, as a fact, may not be readily identifiable by the common man as that forbidden by the statute. One illustration will suffice. Section 20703 of the Health and Safety Code states with definiteness what are "poisons," including, among other things, arsenic compounds. Section 20751 of the same code declares it to be unlawful "for any person to vend, sell or give away . . . any poisons . . ." unless a poison label is used. The ordinary person does not have the learning to enable him to tell an arsenic compound from a harmless drug. Obviously the prevailing ignorance as to poisons and drugs does not render section 20751 unconstitutional.

The Ringelmann Chart has, in addition to the varying lines described in *People* v. *International Steel Corp., supra,* the notation below chart No. 2: "Equivalent to 40 per cent black," and similarly before chart No. 3: "equivalent to 60 per cent black." Section 24242 does not describe the contaminant it prohibits in subdivision (b) as a 40 per cent or 60 per cent opacity, nor in any manner that justifies a reference to the "equivalents." That which is prohibited is the discharge of a contaminant that has an opacity as great or greater than that possessed by smoke which is as dark or darker in shade than Ringelmann No. 2. "40 per cent black" is nowhere declared to mean 40 per cent opaque.

Now we come to what we consider the most difficult question before us. Obviously the legislature, in drafting subdivision (b) took as a premise that smoke that was as dark or darker than Ringelmann No. 2 obstructed the view to an identifiable degree that would serve as a standard for subsection (b). If the premise of the legislature is a sound one, it is sufficiently definite to satisfy due process. On the other hand, if, as several expert witnesses testified, the opacity of the smoke of subdivision (a) may vary from 0 to 100, there is no sufficient standard by which to determine whether the contaminant does or does not offend.

We begin with the presumption that the legislature acted advisedly. We repeat a quotation from an earlier case, found in *Dribin* v. *Superior Court* (1951), 37 Cal. 2d 345, 352, 231 P. 2d 809, 813: "The existence of facts supporting the legislative judgment is to be presumed and the burden of overcoming the presumption of constitutionality is cast upon the assailant."

A question should be noted, at this point, that may arise in future cases. We are not answering the question now because it has not been the subject of debate in any of the cases under review, and in none of the cases would an answer affect the outcome of the appeal. The question is this: May evidence be received for the purpose of showing that the presumption, that the legislature had a basis for its action, is contrary to fact; that it had no basis? An affirmative answer is implicit in the quotation we made from *Dribin* v. *Superior Court*. We call attention, however, to the formidable line of cases, beginning with and citing *Stevenson v. Colgan* (1891), 91 Cal. 649, 652-653, 27 P. 1089, 1090, which give comfort to those who would answer "No." On the

other hand, such cases as *Borden's Farm Products Co.* v. *Baldwin* (1934), 293 U. S. 194, 79 L. ed. 281; *Weaver* v. *Palmer Bros. Co.* (1926), 270 U. S. 402, 70 L. ed. 654, and *United States* v. *Carolene Products Co.* (1937), 304 U. S. 144, 82 L. ed. 1234, may be used to support an affirmative answer to what may be a federal question. Note the annotation in 82 L. ed. 1246, *et seq.*

Certainly, the presumption is not one that can be said off hand to be without foundation. Support for the premise of subdivision (b) is found in the experiences related by the inspectors of the Los Angeles Air Pollution Control District. After many trials they learned to classify smoke according to the Ringelmann Chart. Then they were given experience in determining the opacity of various shades of smoke as determined by an electric eye. Thus, it could be concluded, they were acquainted with the opacity of Ringelmann No. 2 smoke and were trained to determine the opacity of other contaminants, and as a consequence could testify: "The white smoke I saw obscured the view fully as much as smoke of a shade equal to Ringelmann No. 2 would have done," or with equal assurance: "The opacity of smoke that matches Ringelmann No. 2 is 40%; that which was belching from the stack in question had a greater opacity." The circumstance that an inspector, with the usual training, demonstrates as a witness that he is confused and uncertain, does not justify the trial court in striking his testimony, although it would present a strong reason why the jurors, the judges of credibility and the weighers of evidence, should find it of little value.

Further support for a conclusion in harmony with the presumption that the legislature built on a sound

premise, is found in an argument made by some of the defendants. They insist that in subsection (a) one is called upon to look *at* the smoke, and it is only reflected light that is to be taken into consideration, while subsection (b) is only satisfied by ascertaining the comparative degree to which light is obstructed from coming *through* the smoke. This sounds reasonable and leads to this conclusion: If there is a substance in a column of smoke that reflects light so as to make the column as dark as Ringelmann No. 2, then there is a substance which is impervious to the passage of light, and renders the smoke partially opaque. We doubt that any smoke that is as dark as Ringelmann No. 2 would not interfere at all with the passage of light through it, as would be necessary in order to have an opacity of 0%, stated by some defense witnesses to be the fact. On the other hand, the light reflected from the smoke could look white, while the substance that caused the reflection would be impervious to the passage of light.

It is argued that as the question, Does smoke that matches Ringelmann No. 2 have an identifiable opacity?, is one of a scientific nature, we should take judicial knowledge of its answer. It is true that in section 1875 of the Code of Civil Procedure it is provided that "Courts take judicial notice of the following facts: . . . (8) The laws of nature . . ." This code section, however, is to be applied in the light of the cases that deal with it. In *Roy* v. *Smith* (1933), 131 Cal. App. 148, 151, 21 P. 2d 151, 158, we find: "It is true that courts may take judicial knowledge of scientific facts which are commonly recognized . . . Upon the contrary, it is equally true that courts will not take judicial notice of facts which are not matters of common or

general knowledge." Again we find the restrictive words in *Cantrell* v. *Board of Supervisors* (1948), 87 Cal. App. 2d 471, 477, 197 P. 2d 218, 222: "Courts may take judicial knowledge of scientfiic facts which are commonly recognized." The principle is stated more generally in *Communist Party* v. *Peek* (1942), 20 Cal. 2d 536, 546, 127 P. 2d 889, 895: "The doctrine of judicial notice was adopted as a judicial shortcut to avoid necessity for the formal introduction of evidence in certain cases where there is no real need for such evidence. Before a court will take judicial notice of any fact, however, that fact must be a matter of common and general knowledge, well established and authoritatively settled, not doubtful or uncertain. The test is whether sufficient notoriety attaches to the fact to make it proper to assume its existence without proof."

There is no generally accepted answer to the question now under particular scrutiny. Among the 3200 pages of transcript that we have read in these appeals, there has walked a procession of men, educated in some of the best colleges and universities of the country. They are agreed on but a few of the scientific problems presented by "smog." The question whether smoke as dark or darker than Ringelmann No. 2 has an opacity that may be used as a standard of comparison is not one of those on which there appears to be an agreement. We may not take judicial notice that the legislative premise is unsound.

Our conclusions up to this point, therefore, are that both subsections of section 24242 are, on their face, sufficiently definite to constitute criminal statutes; that to warrant a conviction under the section proof must be made: (1) that it was a contaminant that was discharged

into the atmosphere, and (2) that the contaminant was either (a) of a shade as dark or darker than Ringelmann No. 2, or (b) that it obstructed the vision at least as much as would be smoke that was as dark as Ringelmann No. 2. With these conclusions in mind we turn to examine each case.

PEOPLE v. PLYWOOD MANUFACTURERS.

In three counts, in two complaints, charges were made that the defendant had, on three different days, discharged smoke that violated subsection (b). Convicted and sentenced on all three counts the defendant appealed, admitting the sufficiency of the evidence, but attacking the code sections and the complaints. We are affirming the judgments.

By the complaint in each count the defendant corporation was charged with having discharged into the atmosphere "from a source of emission an air contaminant, to wit, smoke, for a period aggregating more than three (3) minutes in one hour, which said contaminant was then and there of such an opacity as to obscure the observer's view to a degree equal to and greater than that designated as Number 2 on the Ringelmann Chart . . ." We refrain from wondering why the word "single" which is employed in the statute was omitted from the complaint, for such speculation is vain. It suffices to say that while it would have been better had the language of the statute been followed, the use of the indefinite article "a" in effect limits the charge to one source of emission. Moreover, the evidence revealed only one possible source of emission, so that if it was error to overrule the demurrer directed to the omission of the "single" word, the error plainly did not prejudice the defendant.

The defendant criticises the complaint because the hour is not specified during which, according to the charge, illegal smoke was emitted for more than three minutes. This was not a legal defect. Section 955, Penal Code, declares: "The precise time at which the offense was committed need not be stated . . . except where the time is a material ingredient in the offense." A complaint that charges that the defendant violated an ordinance forbidding rubbish fires before 7 a. m., or after 11 a. m., in any calendar day would, of necessity, have to allege that the defendant had a fire either before 7 a. m., or after 11 a. m., for in such a case the time is an ingredient of the offense. Not so here, except, of course, that the illegal smoke must exist for three minutes in an hour. "What hour?" is quite immaterial; it need not be specified. Obviously, it would be fairer to the defendant to allege the specific date and hour that the People expect to prove, based upon the information at hand before the complaint was filed. The law does not require, however, that the precise time be given. (See *People v. Fremont* (1941), 47 Cal. App. 2d 341, 117 P. 2d 891, 893; *People v. Sanchez* (1939), 35 Cal. App. 2d 231, 95 P. 169, 173 Moreover, if in charging a violation of section 24242 the time is such an ingredient of the offense that the precise hour should be alleged, failure to do so will not warrant a reversal where—as in this case—no prejudice to the defendant appears from the deficiency in the pleading. (*People v. Mitchell* (1940), 40 Cal. App. 2d 204, 104 P. 2d 545, 548; *People v. Gordon* (1945), 71 Cal. App. 2d 606, 163 P. 110, 116; *People v. Haley* (1951), 102 Cal. App. 2d 159, 227 P. 2d 48, 51.

The judgments of conviction are affirmed. Orders denying motions in arrest of judgment are not appealable.

(Sec. 1466, Penal Code; *People v. Bechtel* (1953), 41 Cal. 2d 441, 446, 260 P. 31, 34.) The appeals from these orders are, therefore, dismissed.

PEOPLE v. SHELL OIL COMPANY.

Two charges were made against the Shell Oil Company and, following verdicts of guilty, two $125 fines were imposed. We have concluded that the judgments should be reversed because of a basic failure in the matter of instructions.

There was much confusion and conflict in the testimony. The theory of the People's case, as to Count I, was that smoke was discharged into the air, of a shade at least as dark as Ringelmann No. 2. The defense produced evidence that that which was seen to emerge from the stack in question was not smoke but condensed steam, not shown to have any contaminating qualities. When we come to consider the evidence respecting Count II, which alleged a violation of subsection (b), we find not only this same conflict, but in addition much confusion as to the meaning of opacity and the "correlation" of opacity to the Ringelmann Chart. Indeed, the confusion began with the second count of the complaint which described the contaminant as being "of such an opacity as to obscure the observer's view to a degree equal to and greater than that designated as number 2 on the Ringelmann Chart." In the premises the defendant was entitled to specific instructions that the burden was on the People to prove beyond a reasonable doubt, (1) that that which was discharged from each stack was a contaminant; and (2) under Count II, that it had the opacity specified in subsection (b).

The trial court gave the general instruction on the presumption of innocence and defining "reasonable doubt" that is contained in section 1096, Penal Code.

The defendant requested the court to instruct the jury that in Count I it was accused of having discharged an air contaminant as dark in shade as that designated as Number 2 on the Ringelmann Chart, and that the prosecution must prove every element of said charge *beyond a reasonable doubt*. The instruction was given but not until a pen had stricken the words we have emphasized. An instruction was requested by the defendant ending with this sentence: "In other words, the prosecution must first establish *beyond a reasonable doubt* the power of No. 2 Ringelmann contaminant to obscure the view of the observer under the conditions prevailing, and then establish that the contaminant, if any, emitted by defendant obscured the observer's view to the same extent." The instruction was given, but with the words we have emphasized omitted; a light pencil line was run through them. As to each count the defendant's request for an instruction that the prosecution must prove beyond a reasonable doubt that the material discharged was a contaminant, was refused. At no time was the jury advised that the burden was on the People to prove every essential fact of the charges beyond a reasonable doubt, or to so prove any one of them.

The claim of error now being considered is not as easily disposed of as the People attempt by their statement that inasmuch as an instruction under section 1096 was given, "No further instruction on the subject of reasonable doubt was necessary," citing Section 1096a, Penal Code. As pointed out in *People v. Wilson* (1929), 100 Cal. App. 428, 431-432, 280 P. 169, 170, that which sec-

tion 1096a declares to be unnecessary, if 1096 is given, is any further instruction in which "reasonable doubt" is *defined;* it "has no application to an instruction covering a defense as shown by the evidence in the case from which reasonable doubt of the guilt of the defendant may be inferred." The reason for reversing the judgment given in *People v. Eckert* (1862), 19 Cal. 603, tells us enough about the case to show that it is pertinent (pp. 604-605): "One of the instructions which the defendant asked the Court to give the jury, but which the Court refused to give, was as follows: 'If they shall find that there is a reasonable doubt of Vance & Reed selling the cow to the Bakers, that defendant sold to Wooldridge, they will give defendant the benefit of the doubt, and find the defendant not guilty.' This instruction should have been given. The fact pointed out by this instruction it was material for The People to prove, in order to establish the defendant's guilt under the other circumstances of this case, and as the charge given by the Court as to reasonable doubt, though appropriate, was general in its terms, the defendant had a right to ask an instruction that if there was a reasonable doubt as to this essential fact, the defendant should have the benefit of it."

Any question as to the authoritative value of so venerable a case as that just cited is set at rest by the fact that the last sentence that we have quoted from it was made use of in *People v. Kane* (1946), 27 Cal. 2d 693, 698-702, 166 P. 2d 285, 288-290, in support of its conclusion that a general instruction *re* reasonable doubt does not suffice if the defendant requests that the doctrine be applied to a particular fact. We find the *Kane* case quite in point. There a real issue in the case centered around the question of the intention with which the defendant, accused of

robbery, had taken a large sum of money from a Marie Nichols. The defendant's theory was that he and Marie had simulated a robbery; he had taken the money from her with her consent. "The trial court refused certain instructions, requested by defendant, as to the specific application of the doctrine of reasonable doubt to the facts as testified to by defendant . . ." This was one of the instructions requested: "Before you can convict the defendant in this case, you must be convinced beyond a reasonable doubt that the property taken was against the will and without the consent of Marie . . ." Two more, to like effect, were requested. All were refused. The judgment was reversed because of the error committed in refusing these instructions. We quote one further passage from the opinion (27 Cal. 2d 699-700, 166 P. 2d 290): "The People further urge that, since the statutory definition of robbery (Pen. Code, sec. 211) and the statutory instruction concerning reasonable doubt (Pen. Code, sec. 1096) were read to the jury, they were fully informed as to the law relating to defendant's theory and the refusal of the more specific instructions requested was not erroneous or, if it was erroneous, could not have prejudiced defendant.

"As to the general statutory definitions of robbery and reasonable doubt, which were given as instructions, a statement from *People v. Cook* (1905), 148 Cal. 334, 347 [83 P. 43], is apt: 'It is true that the instruction given stated the law correctly; but it was brief, general, and colorless in comparison with the instruction asked, and had the effect of minimizing the importance of a consideration which could not have been stated with too much emphasis.'

"The situation is similar to that presented in *People v. Visconti* (1916), 31 Cal. App. 169, 170 [160 P. 410,

411], where the court said, 'In view of the testimony offered for the purpose of establishing an alibi, the defendant asked the court to give an instruction by which the jury was to be informed that in making the proof of an alibi the defendant was not obliged to establish that defense by a preponderance of evidence or beyond a reasonable doubt, but that it was sufficient to entitle him to a verdict of not guilty if the proof raised in the minds of the jury a reasonable doubt as to the presence of the defendant at the place where the crime was alleged to have been committed and at the time referred to in the information. The court refused to give this instruction, or any instruction upon the matter of the defense of an alibi. It seems to be conceded, as it must, that the instruction as proposed was pertinent and proper; but the contention is made that inasmuch as the trial judge did instruct the jury that they must believe beyond a reasonable doubt that defendant committed the crime, no prejudice would arise by reason of the failure to instruct directly upon the matter of the alibi proof. The instruction of the court which was given was general, and stated in substance that before conviction could be had it was incumbent upon the prosecution to prove beyond a reasonable doubt all of the matters alleged in the information. We think that defendant was entitled to have some particular and specific instruction given touching the matter of his defense of an alibi.'

The case of *People v. Reed* (1952), 38 Cal. 2d 423, 430, 240 P. 2d 590, 594, does not cause us to question the value as an authority of *People v. Kane,* from which we have been quoting. In the first place, no instruction requested by the defendant was refused, and, as the court pointed out, a defendant who does not ask that a matter

correctly, but generally, covered be more specifically treated, cannot complain. Moreover, the jury was instructed that "This plea [of not guilty] . . . places the burden upon and makes it the duty of the prosecution, before a conviction can be had, to establish to the exclusion of all reasonable doubt, each and every fact essential to a conviction of the crime charged." It was also advised: "each fact which is essential to complete a chain of circumstances that will establish the defendant's guilt must be proved beyond a reasonable doubt. The case was not faced with the problem considered in *People v. Kane,* and which faces us.

The error in failing to advise the jury that each essential fact had to be proven by the People beyond a reasonable doubt, cannot be said to be without prejudice in this case. We find no support in the record for the statement made by counsel that the instructions were placed in the hands of the jurors, but they may have been. (Sec. 1093, Penal Code.) If they were, the crossed out words may well have led the jury to believe that they did not apply. In any event, in view of the conflict, and confusion, in the evidence, the defendant was entitled to this basic instruction on reasonable doubt as it applied to the particular facts.

The judgment on each count, and the order denying the defendant a new trial, are reversed.

PEOPLE v. UNION OIL COMPANY.

The four complaints filed aganist the Union Oil Company contained, altogether, eight counts, charging violations of section 24242 on seven different days, the charge as to one of the days identifying two different sources of emission. Each count alleged a violation of both subdivi-

sions (a) and (b), but at the outset of the trial the attorney for the People announced that while no charge was to be withdrawn, the evidence to be introduced would be in support of the opacity violations only. Fines ranging from $25 on four of the counts to $500 on one were assessed following defendant's conviction on all eight counts, and from these judgments (and an order denying it a new trial) the defendant has appealed. We find none of the contentions made by the appellant to be sufficiently sound to warrant a reversal.

The defendant presents four points in its briefs, beginning with the contention that section 24242 violates the due process provisions of our constitution. We have already expressed our views on this point. Defendant's second contention centers around the premise that the People's witnesses were not qualified to testify as to the comparative opaqueness of the plumes streaming from defendant's stacks and smoke that was as dark as Ringelmann No. 2. It is our view of the evidence that the trial court correctly refused to advise the jurors not to consider the testimony of the inspectors that were called as witnesses by the People. Whether they should be credited, or such witnesses as Dr. Jeffreys, called by the defendant, should be followed, was a question properly left to the jury.

With the basic principle of defendant's third point we are in accord. It is, that it was incumbent on the People to prove beyond a reasonable doubt, as to each count, that that which had the opacity specified in section 24242, and came from defendant's stacks, was a contaminant. We see no reason, in this opinion, to weigh the evidence in view of the admission in defendant's reply brief that "There is no doubt that the evidence is sufficient to support the verdicts *if it was admissible.*" The argument

that it was inadmissible proceeds as follows: The statute requires opacity to be determined by reference to the Ringelmann Chart; no inspector was trained to determine opacity "by physical use of the Ringelmann Chart"; therefore, no inspector was qualified to testify, and the evidence that he gave was inadmissible. We have already paid our respects to this line of reasoning. Opacity is not to be determined by a comparison with the chart but by a comparison with the opacity of smoke that matches Ringelmann's No. 2; the evidence furnishes a basis for the conclusion that the inspectors' training qualified them to testify; if any one of them appeared poorly qualified, or confused, the weight of his testimony became a problem for the jury; it was not "inadmissible."

The defendant requested an instruction beginning with the words: "Unless you are convinced beyond a reasonable doubt that the defendant" and ending with the words: "you must find the defendant 'not guilty' as to such charge or charges." In between the words quoted was a statement that corresponded to the contents of section 24242, using the alternative (b). The trial court should have given the instruction, but because it was as general as the statute, and that was read to the jury, along with section 1096, Penal Code, we do not deem the error one warranting a reversal. It is often a very close question whether an error is or is not of such a nature that we can say that, in our judgment, the defendant would doubtless have been convicted had the error not been made. Obviously, the identical error may cause a reversal in one case and not in another. (Section 4½, Art. VI, State Constitution.)

It was not error to refuse an instruction, the effect of which was to advise the jury that the guilt of the defendant

could not be established by evidence of the opacity of the substance emitted from its stacks as observed at some distance from them. The evil that the legislature was striving to correct was not the condition of the atmosphere just at the mouth of defendant's stacks. A contaminant that for some reason has no opacity as it emerges may prove to be as fully within the condemnation of section 24242 as does that immediately identifiable.

We see no reason to discuss other features of these cases. The judgments and the orders denying a new trial are affirmed.

PEOPLE v. SOUTHERN CALIFORNIA EDISON COMPANY.

The Southern California Edison Company was originally charged with having violated both subsections (a) and (b) on four different days, but before the trial was over it was agreed by the prosecuting attorney that only subsection (b) was involved. The defendant was found guilty and sentenced to pay a fine of two hundred dollars on each count. In appealing, it presents but three points: (1) that section 24242 is unconstitutionally uncertain; (2) that the evidence was insufficient to establish that it was a contaminant that the defendant had discharged into the air; and (3) that the jury should have been instructed that the effect of Rule 53 of the Air Pollution Control District was to declare sulphur dioxide not a contaminant if it did not exceed in concentration 0.2 per cent by volume.

We do not find the evidence to be insufficient. The jury was warranted in concluding, from it, that the People's witnesses had been trained to tell whether black smoke was as dark or darker than Ringelmann No. 2; to determine the opacity of either black or other smoke;

and that they were familiar with the opacity of smoke as dark as Ringelmann No. 2, and that it was 40 per cent, while smoke identified as Ringelmann No. 3 was 60% opaque. On four different occasions a plume was seen to emanate from one of appellant's smoke stacks, dirty tan in color or a brownish gray, and with an opacity, on one day, of 80%; on another day of 70%; on a third of 65-75%; and, lastly, with an opacity of 70%. On no occasion was that which came forth from the smoke stacks and lingered so long, condensed water vapor. As "regular commercial grade fuel oil" was being burned on the four days when the plumes were noticed, the jury had reason for its evident conclusion that the combustion was incomplete and that smoke resulted. Smoke, we note again, is a contaminant whether or not it is "noxious."

This appellant is one of these who argue that section 24242 is too uncertain to be valid because smoke as dark as Ringelmann No. 2 has no predeterminable opacity. Having already expressed our views on this subject we shall not repeat them. We mention the point only because this appellant suggests—a stronger word is hardly proper —that if the argument is not good, then this requested instruction should have been given the jury: "That statute under which this prosecution is brought presupposes that smoke of the shade designated as No. 2 on the Ringelmann Chart under all conditions will appear to an observer to have the same opacity, and that the same is true with respect to smoke of a darker shade. If from all the evidence in this case there is a reasonable doubt in your minds that this is true, then in so far as it deals with opacity the statute fails to lay down any certain standard of guilt, and you may not return a verdist of 'guilty' against either defendant on the sole ground

that such defendant has discharged into the atmosphere an air contaminant of a forbidden opacity."

Whatever may prove to be the answer to the question, May evidence be received to overcome the presumption that the legislature acted advisedly?, this instruction was erroneous and was properly refused. That which would be under investigation, under the instruction, would not be the defendant's guilt, but the validity of legislative action. That action is not to be held to be invalid in the event the jury has a doubt whether a foundation exists, but, at best, only in the event that it appears without a reasonable doubt that no basis for it did exist. (See *Jersey Maid Milk Products Co. v. Brock* (1939), 13 Cal. 2d 620, 636, 91 P. 2d 577, 586; *Ferrante v. Fish & Game Comm.* (1946), 29 Cal. 2d 365, 371-372, 175 P. 2d 222, 226; and *Borden's Farm Products Co. v. Baldwin* (1934), 293 U. S. 194, 209, 79 L. ed. 281, 288; 297 U. S. 250, 263, 80 L. ed 669, 674.)

The consideration of appellant's remaining point turns our attention to section 24260 of the Health and Safety Code, which authorizes the air pollution control board of any air pollution control district to "make and enforce all needful orders, rules, and regulations necessary or proper to accomplish the purposes of this chapter for the administration of such district." This portion of Rule 53, adopted by the Los Angeles Air Pollution Control Board, was relied upon by the defendant as an official determination that sulphur dioxide of less than 0.2 per cent by volume is not a contaminant: "A person shall not discharge into the atmosphere from any single source of emission whatsoever any one or more of the following contaminants, in any state or combination thereof, exceeding in concentration at the point of discharge: A. Sulphur Compounds

calculated as sulphur dioxides (SO_2): 0.2 per cent, by volume." We are of the opinion that an air pollution board may not, and by its adoption of Rule 53 the Los Angeles Board did not attempt to, exempt sulphur dioxide less concentrated than that described in the rule, from the condemnation of section 24242, if, in fact, it falls within that condemnation. Without laboring the point further, we are convinced that the appellant has no cause to feel aggrieved because its instructions respecting Rule 53 were not given.

We are not persuaded that any ground exists to reverse the judgments in this case. They, and the order denying the defendant a new trial, are affirmed.

Dated November 21, 1955.

BISHOP
Acting Presiding Judge.

I concur in all cases but *People v. Shell Oil Company*. In the latter case I dissent. The majority opinion relies on *People v. Kane* (1946), 27 Cal. 2d 693. This case (a four to three decision) is not presently the law for the following reasons:

1. It is contrary to the later case of *People v. Reed* (1952), 38 Cal. 2d 423, 430: "The court's instruction on the presumption of innocence and defining reasonable doubt followed the language of section 1096 of the Penal Code. By additional instructions, the court explained the effect of the presumption and stated the doctrine of reasonable doubt.

"These instructions, Reed complains, are only general. No instruction was given to the effect that each element of the crime must be proved beyond a reasonable doubt. But the law expressly specifies that the court may read

section 1096 of the Penal Code and need not give any other instruction on the presumption of innocence or reasonable doubt. (Pen. Code, §1096a.) Considering all of the instructions, it appears that the jury was fully and fairly instructed as to all of the rules of law applicable to the evidence."

2. It is in direct conflict with Penal Code 1096a.

3. It relies strongly on *People v. Cook* (1905), 148 Cal. 334, which was decided before 1927, the year in which Penal Code 1096a was enacted.

4. It relies on *People v. Visconti* (1916), 31 Cal. App. 169, and *People v. Wilson* (1929), 100 Cal. App. 428, one decided before and one after Penal Code 1096a was enacted. Neither of those cases supports the principle on which *People v. Kane* was decided. They deal with the burden of proof which rests on a *defendant* to prove the defense of alibi. The distinction between the burden of proof which rests on the prosecution and that which rests on a defendant to prove such defense is pointed out in the dissenting opinion, at page 704, of the Kane case.

I concur in affirming all cases except *People v. Shell Oil Company* (CR A 3286). I would affirm the judgment and the order in that case.

SWAIN
Judge.

I concur in the result announced and all that is said in the Opinion of the Acting Presiding Judge. In order to avoid any misunderstanding, however, I desire to emphasize that in order to establish a violation of section 24242(b), the People must establish beyond a reasonable doubt that the defendant discharged into the atmosphere

from a single source of emission an air contaminant for a period or periods aggregating more than three minutes in any one hour, which contaminant was of such opacity as to obscure an observer's view to a degree equal to or greater than does smoke as dark or darker in shade as that designated as No. 2 on the Ringelmann Chart. Implicit in this is the requirement that the People establish beyond a reasonable doubt the degree to which No. 2 Ringelmann smoke obscures the view of an observer, and a defendant charged with a violation of subdivision (b) is entitled, upon timely request, to an instruction to this effect.

While I cannot escape the feeling that some of the inspectors of the Air Pollution Control District who testified upon behalf of the People were laboring under the erroneous belief that the percentage figures on the Ringelmann Chart expressed degrees of opacity in the sense that smoke of the particular shade obscured the vision of the observer to the same degree, expressed in terms of percentage, as the blackness of smoke of the various shades designated thereon, I am in agreement with the conclusion of Judge Bishop that there was competent evidence, if believed by the jury, as it seemingly was, to support their implied finding that the contaminant emitted by the defendant in each case was such as to obscure an observer's view to a degree equal to or greater than does smoke of a shade as dark or darker than that designated as No. 2 on the Chart.

PATROSSO,
Judge.

APPENDIX B.

In the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

Superior Court No. CRA 3303.

People of the State of California, Plaintiff and Respondent, vs. Union Oil Company of California, Defendant and Appellant. Trial Court No. 32307.

On Appeal from the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California. Mark Brandler, Judge.

Filed Nov. 21, 1955. Harold J. Ostly, County Clerk; by J. MacGregor, Deputy.

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is ORDERED and ADJUDGED that the judgment and order appealed from, made and entered in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same are hereby affirmed.

MEMO.

See opinion filed this date in *People v. Plywood Mfgrs,* CR A 3284.

November 21, 1955.

BISHOP,
Acting Presiding Judge.

We concur.
PATROSSO, *Judge.*
SWAIN, *Judge.*

I, Harold J. Ostly, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, do hereby certify that the foregoing is a true copy of the original judgment entered by said Court in the above entitled cause on the ..... day of ....., 19....., and now remaining of record in this Court.

Witness my hand and seal of the Court affixed this ..... day of ....., 19.....

HAROLD J. OSTLY,
County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.

By.....,Deputy.

In the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

Superior Court No. CR A 3304.

People of the State of California, Plaintiff and Respondent, vs. Union Oil Company of California, etc., Defendant and Appellant. Trial Court No. 33168.

On Appeal from the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California. Mark Brandler, Judge.

Filed Nov. 21, 1955. Harold J. Ostly, County Clerk; by J. MacGregor, Deputy.

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is ORDERED and ADJUDGED that the judgment and order appealed from, made and entered in the Municipal

Court of the Los Angeles Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same are hereby affirmed.

MEMO.

See opinion filed this date in *People v. Plywood Mfgrs,* CR A 3284.

November 21, 1955.

BISHOP,
Acting Presiding Judge.

We concur.
PATROSSO, *Judge.*
SWAIN, *Judge.*

I, Harold J. Ostly, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, do hereby certify that the foregoing is a true copy of the original judgment entered by said Court in the above entitled cause on the ..... day of ....., 19....., and now remaining of record in this Court.

Witness my hand and seal of the Court, affixed this..... day of ....., 19.....

HAROLD J. OSTLY,
County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.

By.....,Deputy.

In the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

Superior Court No. CR A 3305.

People of the State of California, Plaintiff and Respondent, vs. Union Oil Company of California, etc., Defendant and Appellant. Trial Court No. 34226.

On Appeal from the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California. Mark Brandler, Judge.

Filed Nov. 21, 1955. Harold J. Ostly, County Clerk; by J. MacGregor, Deputy.

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is ORDERED and ADJUDGED that the judgment and order appealed from, made and entered in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same are hereby affirmed.

MEMO.

See opinion filed this date in *People v. Plywood Mfgrs,* CR A 3284.

November 21, 1955.

BISHOP,
Acting Presiding Judge.

We concur.
PATROSSO, *Judge.*
SWAIN, *Judge.*

I, Harold J. Ostly, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, do hereby certify that the fore-

going is a true copy of the original judgment entered by said Court in the above entitled cause on the ..... day of ....., 19....., and now remaining of record in this Court.

Witness my hand and seal of the Court, affixed this ..... day of ....., 19.....

HAROLD J. OSTLY,

County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.

By.....,Deputy.

In the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

Superior Court No. CR A 3306.

People of the State of California, Plaintiff and Respondent, vs. Union Oil Company of California, etc., Defendant and Appellant. Trial Court No. 31978.

On Appeal from the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California. Mark Brandler, Judge.

Filed Nov. 21, 1955. Harold J. Ostly, County Clerk; by J. MacGregor, Deputy.

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is ORDERED and ADJUDGED that the judgment and order appealed from, made and entered in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same are hereby affirmed.

MEMO.

See opinion filed this date in *People v. Plywood Mfgrs,* CR A 3284.

November 21, 1955.

BISHOP,
Acting Presiding Judge.

We concur.
PATROSSO, *Judge.*
SWAIN, *Judge.*

I, Harold J. Ostly, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, do hereby certify that the foregoing is a true copy of the original judgment entered by said Court in the above entitled cause on the ..... day of ....., 19....., and now remaining of record in this Court.

Witness my hand and seal of the Court, affixed this ..... day of ....., 19.....

HAROLD J. OSTLY,
County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.

By.....,Deputy.

APPENDIX C.

Statutes Involved but Not Asserted to Be Invalid.

Section 24253 of the Health and Safety Code of the State of California reads as follows:

> "§24253. Same: Misdemeanor: Separate offenses. Every person who violates any provision of this article is guilty of a misdemeanor. Every day during any portion of which such violation occurs constitutes a separate offense." Official edition citation: California Stats. 1947, Ch. 632, Sec. 1, p. 1645.

Section 19 of the Penal Code of the State of California reads as follows:

> "§19. (Punishment for misdemeanor.) Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding five hundred dollars, or by both." Official edition citation: California Am. Stats. 1933, Ch. 847, Sec. 1, p. 2216.

APPENDIX D.

References to, and Quotations From, the Record Showing the Occasions and Manner in Which Appellant Raised the Federal Question, the Method of Raising It and the Way in Which It Was Passed Upon by the Courts Below.

1. By Demurrers to the Complaints.[30]

Demurrers were filed to each count of each of the complaints and as grounds for demur appellant specified that the facts stated did not constitute a public offense.[31] As required by court rule[32] appellant attached a memorandum of points and authorities to each demurrer in support of the ground thereof, in which it was stated, "The contention raised by this demurrer is that Section 24242 of the Health and Safety Code of the State of California is too vague and indefinite to meet the requirements of due process under the * * * Fourteenth Amendment(s) of the Constitution of the United States * * *. The Ringelmann Chart provides no standard from which the defendant can ascertain with what it is charged and what it must do to compiy with said Section 24242; * * *."[33]

All demurrers were overruled.[34]

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[30]See record pp. 4-9, 120-125, 147-152, 175-180.

[31]See Section 1004, Penal Code of the State of California.

[32]See Rule 2 of Judicial Council Rules for Municipal Courts, 23 West's Annotated California Codes 589.

[33]See record p. 149.

[34]See record pp. 53, 127, 156, 183.

2. By Motions for Advised Verdicts.[35]

These motions, presented to the trial court at the conclusion of the evidence, were made as follows:

> "Mr. MacDonald (counsel for appellant): * * * The next motion is a motion for an advised verdict. * * *
>
> "That the evidence in this case—no, the next ground for our motion for an advised verdict, and this applies to all counts and as to each of the counts is that the evidence in this case shows that the statute which the prosecution has on each of these counts is so vague and so without understanding that a person of ordinary intelligence cannot determine therefrom whether or not he is guilty of violating the statute, or not. Now, if your Honor please, we claim that as to each of these counts that the evidence in this case shows that the application of these counts to this defendant or these charges to this defendant and each of these charges would deprive this defendant of his rights under the Federal Constitution under the due process clause of the Fourteenth Amendment * * *."[36]

The trial court denied these motions.[37]

3. Motions in Arrest of Judgment.[38]

These motions were reduced to writing and filed after the verdicts were rendered. Under California procedure motion in arrest of judgment has been held to be a

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[35]See Section 1118, Penal Code of the State of California.

[36]See record pp. 1188, 1191.

[37]See record pp. 1211, 1212.

[38]See Section 1185, Penal Code of the State of California.

proper method of attacking the validity of a state statute on the ground of its being repugnant to the United States Constitution.[39]

We quote from these written motions in part, as follows:

"Comes now defendant, UNION OIL COMPANY OF CALIFORNIA, a corporation, and moves the Court that judgment in each of the above-entitled consolidated actions, and as to the separate counts included in cases numbered 32307, 31978 and 34226, and each of them, be arrested upon the following grounds, and each of them:

I.

"That the facts stated in the complaints on file in cases numbered 32307, 33168, 31978 and 34226 of the files of this Court do not, nor do the facts stated in each or any of said complaints, or in any of the counts in the complaints numbered 32307, 31978 and 34226, constitute a public offense, for the reason that Section 24242 of the Health and Safety Code of the State of California, and the manner of enforcement of said section as to this defendant, is invalid insofar as the same is pertinent to these cases, or to any of them, or to any count in cases numbered 32307, 31978 and 34226, because said Section 24242, and the manner of enforcement of Section 24242, violates the Fourteenth Amendment of the Constitution of the United States as to defendant, in each of the following particulars:

"1. That Section 24242, and the manner of enforcement of said section as to defendant, is uncertain, indefinite and vague in that the definition of

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[39]*People v. McIntyre*, 32 Cal. App. 2d Supp. 752, 761, 48 P. 2d 560, 564, 565.

the crime or standard of conduct cannot be ascertained therefrom and is discriminatory and void in that said Section 24242 deprives defendant of its property without due process of law."[40]

The trial court denied these motions.[41]

4. In the Court Below, on Appeal From the Judgments of the Trial Court.

Under state practice the appellant from a judgment of a Municipal Court is required to specify the grounds of his appeal[42] in the Statement on Appeal the files in the Appellate Department of the Superior Court.

Among other grounds appellant specified in its Statement on Appeal the following grounds of appeal:

"Defendant hereby specifies the grounds upon which it intends to rely upon said appeals. Inasmuch as in some instances two or more errors specified raise the same legal question, defendant, for the convenience of the Appellate Court and counsel, has grouped errors assigned by it raising the same legal question together under a single heading and at the same time for facility of reference has numbered each error assigned separately. Said grounds are as follows:

I.

"SECTION 24242 OF THE HEALTH AND SAFETY CODE ON ITS FACE, AND AS APPLIED TO THE DEFEN-

---

[40]See record pp. 41, 42.

[41]See record pp. 1304, 1305.

[42]See Rule 4(b) of Rules on Appeal from Municipal Courts and Inferior Courts in Criminal Cases adopted by the Judicial Council, 23 West's Annotated California Codes 576, which states in part, "In every such statement the appellant shall specify the grounds on which he intends to rely upon appeal * * *"

DANT AS SHOWN BY THE EVIDENCE, IS UNCERTAIN, INDEFINITE AND VAGUE, IN THAT THE DEFINITION OF THE CRIME OR THE STANDARD OF CONDUCT PROSCRIBED THEREIN CANNOT BE ASCERTAINED THEREFROM, AND IS DISCRIMINATORY AND VOID IN THAT SAID CODE SECTION DEPRIVES DEFENDANT OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW, * * * IN VIOLATION OF THE FOURTEENTH * * * AMENDMENT(S) OF THE CONSTITUTION OF THE UNITED STATES * * *.

"1. The Court erred in overruling the demurrer of defendant in each of the consolidated cases and in each of said counts.

"2. The Court erred in denying defendant's motion for an advised verdict and for a dismissal, made at the close of the evidence and before the case was submitted to the jury, in each of the consolidated cases and in each of said counts, which motion was made upon the grounds specified in said Reporter's Transcript and also in defendant's written motion in arrest of judgment on file herein.

"3. The Court erred in denying defendant's motion in arrest of judgment in each of the consolidated cases and in each of said counts, which motion was made upon the grounds specified in said Reporter's Transcript and also in defendant's written motion in arrest of judgment on file herein."[48]

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[48]See record pp. 68, 69.

APR 13 1956
HAROLD B. WILLEY, Cle

IN THE

Supreme Court of the United States

October Term, 1955
No. 802

UNION OIL COMPANY OF CALIFORNIA, a corporation,
Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal From the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

MOTION TO AFFIRM THE JUDGMENT AND/OR DISMISS THIS APPEAL.

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IN THE

Supreme Court of the United States

October Term, 1955

No. .....

UNION OIL COMPANY OF CALIFORNIA, a corporation,

Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

MOTION TO AFFIRM THE JUDGMENT AND/OR DISMISS THIS APPEAL.

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, rendered and entered on November 21, 1955, be affirmed, and/or that the appeal taken therefrom to this Court be dismissed on the ground that the federal question is so unsubstantial as not to warrant further argument, and upon the further ground that the said judgment appealed from rests upon an adequate non-federal basis.

Statement.

This is a direct appeal from a final judgment entered on November 21, 1955, by the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

Appellant was charged in four separate verified complaints, filed in the Municipal Court of Los Angeles Judicial District, with having committed eight violations of Section 24242 of the Health and Safety Code of the State of California. Each complaint alleged that, on separate occasions, appellant

> "did wilfully and unlawfully, at 1660 Anaheim Boulevard, Wilmington, in the City of Los Angeles, discharge into the atmosphere from a single source of emission . . . an air contaminant for a period aggregating more than three minutes in any one hour, which contaminant was then and there: (a) as dark and darker in shade as that designated as No. 2 on the Ringelmann Chart, as published by the United States Bureau of Mines; and (b) of such opacity as to obscure the observer's view to a degree equal to and greater than does smoke described in (a) above."

The four cases were consolidated for trial and evidence was presented to a jury for a period of nine days. The verdict of the jury was that appellant was guilty on all charges. After the pronouncement of judgment an appeal was duly taken to the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles. Briefs were filed in said appellate court and oral argument presented. The matter was submitted and thereafter the judgments of conviction were affirmed by said court. No petition for a rehearing in said matter was filed by appellant. A notice of appeal to this court was thereafter presented.

Argument.

The decision of said Appellate Department of the Superior Court is plainly correct.

The extent and limits of what is known as the police power have been a fruitful subject of discussion in the appellate courts of nearly every state in the Union. It is universally conceded to include everything essential to the public safety, health and morals. To justify the state in interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally require such interference, and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

Lawton v. Steele, 152 U. S. 133.

Under California law it is well settled that a criminal statute which is so indefinite, vague and uncertain that the definition of the crime or standard of conduct cannot be ascertained therefrom, is unconstitutional and void. However, there is a uniformity of opinion among the authorities that a statute will not be held void for uncertainty if any reasonable and practical construction can be given to its language. Nor does the fact that its meaning is difficult to ascertain or susceptible of different interpretations render the statute void. All presumptions and intendments favor the validity of a statute and mere doubt does not afford sufficient reason for a judicial declaration of invalidity. Statutes must be upheld unless their unconstitutionality clearly, positively and unmistakably appears. Doubts as to its construction will not justify the court in disregarding it. In determining whether a penal statute is sufficiently explicit to inform those who are subject to it what is required of them the courts must

endeavor, if possible, to view the statute from the standpoint of the reasonable man who might be subject to its terms. It is not required that a statute, to be valid, have that degree of exactness which inheres in a mathematical theorem. It is not necessary that a statute furnish detailed plans and specifications of the acts or conduct prohibited. The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding.

Smith v. Peterson, 131 Cal. App. 2d 241, 245-246.

Another rule of construction is that a statute shall be read in the light of the problem that it was designed to solve.

Wotton v. Bush, 41 Cal. 2d 460, 467.

The leading case in the United States on the constitutional limitations on smoke abatement laws is the case of *Northwestern Laundry v. Des Moines,* 239 U. S. 486. This court, in affirming the decision of the District Court, stated as follows:

> "So far as the Federal Constitution is concerned, we have no doubt the state may by itself, or through authorized municipalities, declare the emission of dense smoke in cities or populous neighborhoods a nuisance and subject to restraint as such; and that the harshness of such legislation, or its effect upon business interests, short of a merely arbitrary enactment, are not valid constitutional objections. Nor is there any valid Federal constitutional objection in the fact that the regulation may require the discontinuance of the use of property, or subject the occupant to large expense in complying with the terms of the law or ordinance. Recent cases in this court are Reinman v. Little Rock, 237 U. S. 171, 59 L. ed. 900,

35 Sup. Ct. Rep. 511; Chicago & A. R. Co. v. Tranberger, 238 U. S. 67, 59 L. ed. 1204, 35 Sup. Ct. Rep. 678; Hadacheck v. Sebastian, decided December 20th, 1915 [239 U. S. 394, *ante*, 348, 36 Sup. Ct. Rep. 143].

"That such emission of smoke is within the regulatory power of the state has been often affirmed by state courts. (Cases cited.)"

In *Moses v. United States,* 16 App. D. C. 428, 50 L. R. A. 532, involving an Act of Congress for the District of Columbia on the subject of smoke, it was stated that the only inhibition on the states is that the classification of the persons and things shall not be arbitrary. If there be some reasonable basis for the classification made, it is not obnoxious to the charge of denial of equality.

The Appellate Department of the Superior Court in the case of *People v. International Steel Corp.,* 102 Cal. App. 2d Supp. 935, upheld this statute against constitutional attack, stating:

". . . We have concluded that the control of 'smog' is a proper subject of the police power, that the prohibitions of the statute herein mentioned violate none of the constitutional provisions referred to . . .

"The general purpose of the law above mentioned, as appears from sections 24198 and 24199 of the Health and Safety Code, is to reduce air contamination where it exists, 'in order to safeguard life, health, property and the public welfare and to make possible the comfortable enjoyment of life and property.'"

After setting forth the provisions of the charging sections of the statute, it was further stated:

"This provision is attacked on the ground that it sets forth no ascertainable standard of guilt and is

> fatally uncertain, by reason of its reference to the Ringelmann Chart for the description of the forbidden air contaminant . . . The term 'air contaminant' is defined by section 24208 to include smoke and a variety of other specified emanations. All that is needed further for certainty in section 24242, as it applies here, is some means of determining the density or opacity of smoke that is forbidden. . . . A statute may refer to and adopt, for an expression of the legislative intent, a statute, or rules or regulations of another state or of the United States . . . We think it is equally permissible for a statute to refer to and adopt, for description of a prohibited act, an official publication of any United States board or bureau established by law, such as the United States Bureau of Mines . . ."

Following a description of the nature of the Ringelmann Chart, the court stated:

> ". . . Estimates of the density of smoke may be made by glancing from this chart so displayed to smoke, and picking out the section on the chart which most nearly resembles the smoke. This mode of measuring the density of smoke has been in use, it appears, for over 50 years. This affords a reasonably certain mode of determining and stating the density and opacity of smoke, and we think that the statute adopting it is not lacking in certainty."

In the case of *Penn-Dixie Cement Corp. v. City of Kingsport,* 189 Tenn. 450, 225 S. W. 2d 270, the ordinance there concerned also incorporated the Ringelmann Chart. The court stated, in upholding the constitutionality of the ordinance, that there was no merit in the contention that the property of the plaintiff in error was being taken

or destroyed without due process of law in violation of the State or Federal Constitution.

Other cases wherein the Ringelmann Chart was referred to in the ordinance are: *Board of Health of Weehawken v. New York Central Ry. Co.*, 4 N. J. 293, 72 A. 2d 511; *Board of Health of Weehawken v. New York Central Ry. Co.*, 10 N. J. 294, 90 A. 2d 729; *State v. Mundet Cork Corp.*, 8 N. J. 359, 86 A. 2d 1. In the latter case the ordinance referred to No. 2 of the Ringelmann Chart, as does the statute here involved, and provided further "or (smoke) which is so dense as to be dimly seen through at the point of emission into the external air from any stack or open fire . . ." The court there stated:

> ". . . The premise of the defendant is that the ordinance is ambiguous and must be construed to exclude the vaporous emanations, exhaust steam from the cork baking process, expelled into the atmosphere from defendant's stack. This question must be resolved against defendant."

The opinion rendered by the Appellate Department of the Superior Court (pp. 19-47, inclu., Jurisdictional Statement), is logical, well reasoned and clearly in accord with the reasons and rules of law found in the cases hereinbefore cited. It is noted in said opinion that the cases cited by the court in support of the various propositions expounded, are all California decisions. This fact furnishes the ground for appellee's assertion that the Appellate Court decided the issues of this case on a non-federal basis and relied solely on decisions rendered by the California courts

and that the decision rendered in this case was solely on the basis of California law. It is further noted on page 38 of the Opinion that the court stated:

> "The defendant (Union Oil Company) presents four points in its briefs, beginning with the contention that section 24242 violates the due process provisions of *our constitution.* We have already expressed our views on this point." (Emphasis added.)

Appellant's contention that the statute here involved violates constitutional provisions appears to appellee to be directed to the question of the weight of evidence and against the method of proof used in establishing the violation and not actually against the various provisions of the statute itself. This is apparent from the arguments advanced. On page 5 of the Jurisdictional Statement it is asserted:

> "It is necessary to show, however, that it is applicable to subdivision (b) of the statute *under the facts* in these cases . . ."

The argument advanced beginning on page 7 concludes with this statement on page 8:

> ". . . and this, *we expect to show, is scientifically impossible and contrary to the uncontradicted evidence.*"

On page 9 it is stated:

> "This is borne out by the *uncontradicted testimony in these cases* . . ." (All emphasis added.)

It is to be noted further that appellant also attempts to present new evidence to this court. This is being done by referring to "Hering Grey Series" and the works

of Dr. Southall (pp. 9-11, incl., Jurisdictional Statement). Such matters were not at any time introduced at the trial or referred to in any manner. Reference is again made to the evidence presented in the trial court on pages 12 15 and 16 of the Jurisdictional Statement.

The Appellate Department of the Superior Court held the word "opacity" as used in the statute to mean "want of transparency." In simple terms the statute condemns smoke or any other contaminant that is at least as hard to see through as is smoke which is as dark or darker than is smoke described as No. 2 of the Ringelmann Chart (Jurisdictional Statement, p. 24). This conclusion is based on the meaning of the words used and not on the evidence presented to show that a violation had been committed. The reasonable man subject to the provisions of this statute should certainly be able to understand the meaning of the statute as thus defined.

In its Conclusion appellant asserts on page 17 of the Jurisdictional Statement:

> "Certainly, modern science and engineering should be capable of devising a means of regulating the emission of air contaminants that is at once understandable and more effective than that prescribed by subdivision (b)."

In *Smith v. Peterson,* 131 Cal. App. 2d 241, the District Court of Appeal of the State of California has given a complete answer to such contention. It was there stated that the mere fact there may have been some new scientific instrument capable of measuring noise (there in-

volved) more scientifically would not make the statute unconstitutional.

In the case of *People v. Newman*, 19 N. Y. S. 2d 902, it is stated in the opinion of the court:

> "Defendant advances the belief that in the application of Section 211, proof of actual density of smoke should be supplied, and that evidence of density derived solely from visual observation is neither valid nor reliable. However desirable it might be to have some practical and scientific method of measuring the actual density of smoke under a statute which would prescribe permissible densities and maximum periods of emission, the fact is that we have no such statute under consideration here. . . . Our courts have affirmed numerous convictions where the evidence of dense smoke was based solely on visual observations by trained inspectors. The validity of such testimony has never been successfully challenged . . ."

The opinion in the *Newman* case, *supra,* discusses the photo-electric cell and its use, and asserts that when no rays of light can penetrate the smoke then only is there a reading of 100% density; that intermediate degrees of density are recorded by means of the photo-electric cell, depending upon the amount of light reaching the cell through the smoke. The court concludes with this statement: "This is concededly an arbitrary standard by which to measure density."

Appellant strongly relied on the use of such a photo-electric cell to establish a defense to the charges in the trial court and appears to urge this court to consider such

evidence in its consideration of the alleged unconstitutionality of the statute. Such argument should be addressed to the question of proper weight to be given to the evidence, not to the question of the constitutionality of the statute iself.

Appellee respectfully urges, therefore, that the appellant presents no substantial question for the decision of this Court; that the judgment of conviction sought to be appealed from should be affirmed and/or the appeal dismissed.

Respectfully submitted,

ROGER ARNEBERGH,
DONALD M. REDWINE,
PHILIP E. GREY,
Counsel for Appellee.

APR 26 1956
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

October Term, 1955
No. 802

UNION OIL COMPANY OF CALIFORNIA, a corporation,
Appellant,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal From the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

Brief of Appellant Opposing Motion to Affirm Judgment and/or Dismiss Appeal.

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IN THE

Supreme Court of the United States

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No. 802

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v.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal From the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

Brief of Appellant Opposing Motion to Affirm Judgment and/or Dismiss Appeal.

The grounds for appellee's motion are (1) that the federal question is so unsubstantial as not to warrant further argument, and (2) that the judgments appealed from rest upon an adequate non-federal basis.

1. The Substantiality of the Federal Question.

Appellee's motion contains so many generalities irrelevant to the substantiality of the federal question presented on these appeals, that it might be well to repeat this question. To paraphrase the court below, it is whether smoke as dark as or darker than Ringelmann No. 2 obstructs the view to an identifiable degree. Counsel assert this question is unsubstantial, but they give no reasons in support of such assertion. In fact, they ignore the question completely and content themselves with general observations concerning the police power and decisions dealing with the Ringelmann Chart as a measurement of shade.

Appellee complains that Hering's Grey Series and Dr. Southall's work were not introduced at the trial. We brought these phenomena to the attention of this court by asking the justices to take judicial notice of them. Appellee advances no reason why they cannot do so.

There is no basis for appellee's assertion that our argument appears to be directed "to the question of the weight of evidence and against the method of proof used in establishing the violation and not actually against the various provisions of the statute itself." Appellee obviously confuses evidence as to violations of the statute, matters beyond attack if the statute is valid, with evidence bearing on the crucial issue of whether it is possible

to measure the opacity of an emission in terms of shade. As we pointed out in our Jurisdictional Statement (pp. 12, 13), the testimony of all the witnesses, defense and prosecution alike, was in accord with scientific law, *i. e.,* that there is no such identifiable relationship, and we challenged opposing counsel to call attention to anything in the record to the contrary. Appellee makes no pretense of meeting this challenge. In fact, as we have noted, appellee ignores this issue entirely; yet it is the all-important issue on these appeals.

2. The Validity of the California Statute Was Drawn in Question on the Ground of Its Being Repugnant to the Fourteenth Amendment and the Decision of the Court Below Is in Favor of Its Validity.

We do not understand what appellee means by the assertion that the court below "decided the issues of this case on a non-federal basis." Appellant raised the federal question at the beginning of this litigation and at all appropriate times thereafter;[1] and the lower court decided it adversely to appellant.

---

[1]See Appendix D to Jurisdictional Statement p. 53, *et seq.*

Conclusion.

As we see it, none of the considerations advanced by appellee in support of its motion have any bearing on the substantiality of the federal question here presented. The motion should be denied and probable jurisdiction noted.

Respectfully submitted,

ALEXANDER MACDONALD,
L. A. GIBBONS,
DOUGLAS C. GREGG,
A. ANDREW HAUK,
Counsel for Appellant.

FILED
MAY 31 1956
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

October Term, 1955
No. 802

UNION OIL COMPANY OF CALIFORNIA, a corporation,
Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal From the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

PETITION FOR REHEARING.

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IN THE

Supreme Court of the United States

October Term, 1955
No. 802

UNION OIL COMPANY OF CALIFORNIA, a corporation,
Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal From the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

PETITION FOR REHEARING.

Appellant respectfully petitions this Honorable Court for a rehearing of the order dismissing the appeals herein for want of a substantial federal question. Our petition is not based upon anything that has transpired since the order was made; it is grounded on the belief that the court, because of the many appeals and petitions for writs of certiorari it must pass upon, did not have sufficient opportunity to weigh the seriousness of the constitutional point drawn in question.

Whether resort is had to the uncontradicted testimony in the record or to judicial knowledge of scientific fact, it is clear that the standard set up by the statute complained of is meaningless and therefore violates the due process clause of the Fourteenth Amendment. Nothing in appel-

lee's motion to dismiss and/or affirm disputes that the statute is fatally vague. Nor is there anything in appellee's contention that the judgments appealed from rest upon an adequate nonfederal basis; the court below could not have affirmed the convictions in the trial court without passing on the federal question.

The question of whether legislation of this kind violates the Federal Constitution has never been passed on by this court. We assume, therefore, that the appeals were dismissed because the question was deemed to be unsubstantial, in the sense that it was unimportant.

The convictions of appellant, a large corporation, and its liability to pay fines of a few hundred dollars may not appear to be important, but the principle behind them is. If the judgments are permitted to stand, it is possible for not only this appellant but for thousands similarly situated to be convicted frequently, even daily, of violations without having any means of knowing, short of suspending operations entirely, how they can comply with the law.

Unfortunately, the dismissal of the appeals in these cases without the benefit of plenary briefs and oral argument leaves the question up in the air. We have no quarrel, in fact we sympathize, with the reasons behind the court's practice of weeding out appeals deemed to present unsubstantial federal questions, but, as stated in 69 Harvard Law Review, 707, such "practice has often proved bewildering to litigants, legislative bodies, writers, and to state and lower federal courts." This is the situation that will be created in these cases unless a rehearing is granted and plenary briefs and oral argument permitted; for where, as here, it is not possible to live with a statute, further litigation can be anticipated until the question is resolved.

We do not have to labor the point that air pollution control today is a problem of a national scope, nor that the question we have raised will affect millions of people.

As long as the meaningless standard in this statute is allowed to stand as one of the principal tools in the abatement of air pollution, it will be detrimental not only to the people of Los Angeles County but to those residing elsewhere. It is therefore to the decided advantage of all persons residing in urban communities throughout the nation that the question raised in these cases be decided authoritatively now. Such a decision would settle once and for all whether a statute which measures opacity in terms of shade is legally eligible as an instrument of air pollution control.

It is respectfully requested that a rehearing be granted and that the court note probable jurisdiction.

Respectfully submitted,

ALEXANDER MACDONALD,
L. A. GIBBONS,
DOUGLAS C. GREGG,
A. ANDREW HAUK,
Counsel for Appellant.

Certificate of Counsel.

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

ALEXANDER MACDONALD,
Counsel for Appellant.

MOTION FILED APR 25 1956

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

NO 802

UNION OIL COMPANY OF CALIFORNIA,
a Corporation, Appellant,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF FOR AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

NO 802

UNION OIL COMPANY OF CALIFORNIA,
a Corporation, Appellant,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE URGING THE EXISTENCE OF A SUBSTANTIAL FEDERAL QUESTION

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Air Pollution Control Association (hereinafter called "APCA"), respectfully moves for leave to file a brief *amicus curiae* in this case prior to the consideration of the jurisdictional statement. This motion is made under Rule 42 in order to urge the existence of a substantial federal question.

The consent of the attorney for the appellant has been obtained. The consent of the attorney for the appellee was requested but was refused.

The interest of APCA in this case arises from the fact that it is the only organization in the United States whose exclusive purpose is "to foster the control of atmospheric pollution and improve sanitation of the air." APCA believes that the determination of the federal question raised by this appeal is of vital concern to

the future development of state and local legislation concerning air pollution.

APCA, having its headquarters in Mellon Institute, Pittsburgh, Pennsylvania, has, since 1907, been the organization in this country most concerned with the development of air pollution control techniques. APCA is wholly objective, its membership consisting, *inter alia*, of representatives of civic and scientific organizations, municipal air pollution control officers, representatives of manufacturers of air pollution control appliances and representatives of industries which emit air pollutants.

In the instant case, the parties do not have available, and accordingly will not be able to present to this Court, the facts showing the impact which the decision of the lower court will have on air pollution legislation throughout the nation. APCA desires to file the accompanying brief in order that this Court may have before it the point of view and the experience of the one organization in this country devoted to the furtherance of air pollution control, and whose membership consists of both enforcement officers of such legislation and the industries against which enforcement is sought. It is the conviction of APCA that because air pollution legislation is now moving from the limited field of dirt and smoke regulation to the much broader field of regulation of all effluents whether they be black, white, colored or invisible, the question raised by this appeal is vital and must be resolved by this Court if air pollution legislation is to continue to develop constructively and without undue chaos and confusion.

Respectfully submitted,

FRANK L. SEAMANS
ROBERT F. PATTON

April 24, 1956

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

NO 802

UNION OIL COMPANY OF CALIFORNIA,
a Corporation, Appellant,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

AMICUS CURIAE BRIEF FILED BY AIR POLLUTION CONTROL ASSOCIATION URGING THAT PROBABLE JURISDICTION BE NOTED

Purpose of This Brief

The question raised on this appeal is whether a state statute regulating air pollution, by prohibiting any emission having an opacity measured in terms of color or shade of color, is unconstitutional because it is so vague, uncertain and indefinite that it fails to prescribe an ascertainable standard of guilt and is, therefore, a denial of due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States. This brief is filed by Air Pollution Control Association for the purpose of bring-

ing to the Court's attention the conviction of this association that this appeal raises a substantial federal question and one of real concern and moment to the subject of air pollution regulation, a subject which is becoming increasingly important throughout the entire country.

Air Pollution Control Association (hereinafter called "APCA"), takes no position regarding the validity or invalidity of the statute in question. It speaks only so that this Court may have before it the facts demonstrating that the orderly development of state and local regulation of air pollution will be retarded until this question is finally decided.

What Is the Air Pollution Control Association?

The Air Pollution Control Association, with headquarters in Mellon Institute, Pittsburgh, Pennsylvania, is the only association in this country devoted exclusively to the purpose of furthering the knowledge and practice of air pollution control. It has been in existence since 1907, having operated successively under the names of the International Smoke Prevention Association, the Smoke Prevention Association of America, Air Pollution and Smoke Prevention Association of America, and, finally, Air Pollution Control Association.

It is a nonprofit organization representing the broadest cross section of "know how" available in the field of air pollution control and in methods of governmental regulation. Its membership includes individuals representing educational institutions, research institutes and agencies, industrial establishments, manufacturers of air pollution control equipment, civic organizations

and citizen groups, governmental agencies, including control officials, representatives of state and county governments and members of federal agencies such as the Bureau of Mines, the United States Public Health Service, etc. It has a membership of over 1,300 individuals and corporations. Both the appellant and the Los Angeles County Air Pollution Control District are represented in this organization.

The broad base or scope of the membership of the association, which includes authorities in all the fields of science and government having to do with air pollution, produces an objective viewpoint which is not permitted to tilt in favor of any group or interest. The action here undertaken was authorized by the Board of Directors of the association.

The sole objective of APCA in taking an interest in this case is to promote clarity and certainty in air pollution legislation so that both those charged with enforcement and those against whom regulatory legislation is enforced can conduct themselves intelligently under valid and scientifically sound legislation.

The Issue

The issue in this case is whether there is such a relationship between color or shade of color and degree of opacity that use of the former to determine the latter provides a sufficiently definite and certain standard of guilt that a conviction under such a law is valid and not a denial of due process of law.

The Ringelmann Chart employed in the California statute used in Los Angeles is a color chart with shades

of gray. Section 24242 (b) of the California statute prohibits discharge into the atmosphere of an air contaminant for a period of more than three minutes in one hour which is of "such opacity as to obscure an observer's view to a degree equal to or greater than does smoke described in subsection (a) of this section." Subsection (a) of that section prohibits discharge of emissions as dark or darker in shade than smoke designated as No. 2 on the Ringelmann Chart, published by the United States Bureau of Mines. Thus the statute proscribes any emission having an opacity equal to or greater than a certain shade of smoke.

Appellant contends that as a matter of scientific fact there is no connection between opacity and color or shade of color and that, consequently, any penal statute that permits a conviction on the basis of an opacity determination based on the observation of a shade or color cannot be accurate and does not contain such definiteness and certainty as is required by the due process clause of the Fourteenth Amendment of the Constitution of the United States.

Why the Appeal Raises a Substantial Federal Question

As is indicated by the changes in name which have taken place in this association, air pollution control, which started out to be a matter almost wholly concerned with *smoke and dirt* control, has now passed from that stage and is embracing all air pollutants whether or not the pollutants are black, white or colored. In the earlier days of air pollution control almost all of the governmental legislation was found in the section of the country east of the Mississippi where smoke, and mostly bitu-

minous coal smoke, which is black or gray in color, was the problem and was the object of the regulatory legislation. In recent years, however, we have seen air pollution control efforts extended to other parts of the country and to other types of operations than those involving coal. As a result, it is now recognized that non-smoke emissions containing various compounds and chemicals form as great or greater contaminant menace in the air than do the smoke emissions from coal or other carbonaceous material.

Los Angeles, of course, is a leading example of situations where the problem is not principally dirt and smoke but rather a combination of compounds and chemicals which are either light in color or invisible but which, nevertheless, pollute the air to the annoyance and discomfort of the residents.

The Ringelmann Chart referred to in the California statute was devised as a means of measuring the density of smoke which was gray or black in color. Bureau of Mines Information Circular 7718, August, 1955, at page 1, says this about the Ringelmann Chart:

> "The Ringelmann Smoke Chart, giving shades of gray by which the density of columns of smoke rising from stacks may be compared, was developed by a Professor Ringelmann of Paris. Maximilan Ringelmann, born in 1861, was professor of agricultural engineering at l'Institute National Agronomique and Director de la Station D'Essais de Machines in Paris in 1888, and held those positions for many years thereafter.
>
> "The chart apparently was introduced into the United States by William Kent in an article pub-

lished in 'Engineering News' of November 11, 1897, with a comment that he had learned of it in a private communication from a Bryan Donkin of London. It was said to have come into somewhat extensive use in Europe by that time. Kent proposed in 1899 that it be accepted as the standard measure of smoke density in the standard code for power-plant testing that was being formulated by the American Society of Mechanical Engineers.

"The Ringelmann Chart was used by the engineers of the Technologic Branch of the Federal Geological Survey (which later formed the nucleus of the present Bureau of Mines) in their studies of smokeless combustion beginning at St. Louis in 1904, and by 1910 had been recognized officially in the smoke ordinance for Boston passed by the Massachusetts Legislature.

"The chart is now used as a device for determining whether emissions of smoke are within limits or standards of permissibility (statutes and ordinances) established and expressed with reference to the chart. It is widely used by law-enforcement or compliance officers in jurisdictions that have adopted standards based upon the chart." (Underscoring added).

Smoke, of course, is the visible carbonaceous particle resulting from the incomplete combustion of a fuel, which, as a chimney effluent, may have a black or gray color. When a state or political subdivision thereof desires to restrict the emission of pollutants which are not black or gray as in the Ringelmann Chart, effort may be made, with some logic, to restrict the opacity of

the emission rather than its color. The question to be answered, however, is how to measure the opacity for the purpose of a criminal statute. The California statute answered this question by prohibiting an opacity which obscures an observer's view to a degree equal to or greater than does smoke of the color shown in Ringelmann Chart #2. In other words, under the California statute, regardless of the color of the effluent, it cannot be more opaque than is a smoke effluent which is as dark in color as that shown on #2 of the Ringelmann Chart.

As one would expect, the trend in control of air pollution throughout the country is toward restriction in the opacity of effluent plumes which are not black or gray as in the Ringelmann Chart test, but which may be yellow, as from a chemical plant, blue as from certain iron foundries, red as from certain steel plant emissions, white as from zinc or lead operations, or even invisible as fluorides emitted from various kinds of industrial establishments. Because of the long period of use of the color comparison idea founded on the Ringelmann Chart, it is only natural that in other parts of the country, as well as California, attempt will be made to base the criminal restrictions on an association between color or shade of color and opacity provided that such a standard is constitutional.

A statute similar to the California act herein challenged has already been passed in Kentucky (ch. 77, Ky. Rev. Stat. Sec. 77. 155 (1) (b)), and statutes also incorporating the opacity test of the California statute have been introduced in the legislatures of Michigan (House Bill No. 87), Pennsylvania (Senate Bill No. 279), and

South Carolina (House Bill No. 1533). Ordinances containing the same opacity test have been enacted in Anne Arundel County, Maryland, City of Albuquerque and County of Bernalillo, New Mexico, and City of Miami, Florida. Regulation "O" of the Department of Air Pollution Control of New York City also provides for a similar test of opacity.

If the California statute in question is unconstitutional as claimed by appellant, then all of the above mentioned laws, ordinances and regulations will likewise be invalid.

More important, if this standard of measuring opacity is declared constitutional it can be expected that the next several years will see a great many other similar laws passed in the various cities and states of this country regulating opacity by relationship to color or shade of color.

Now that the question of the constitutional validity of the relationship between opacity and color or shade of color has been raised in this appeal under the California statute, those whose responsibility it is to develop legislation and to develop legislative standards for determining the density of emissions will be confused and hampered until the question raised by this appeal is authoritatively answered by this Court.

Conclusion

APCA, desiring to serve no end other than the obtaining of workable, realistic, reasonable and valid legislation to promote air pollution control, respectfully urges this Court to take jurisdiction in this appeal and to decide on the merits the federal question raised.

Respectfully submitted,

FRANK L. SEAMANS
ROBERT F. PATTON
